
Disasters and Their Impact on the Performance of Contractual Obligations: A Comparative Study

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Abstract

The article is about the impact of disasters on contractual obligations. These disasters are part of the concept of force majeure when force majeure conditions are met and implementation of the obligation becomes permanently or temporarily impossible because of those conditions. Thus, recognizing the debtor's responsibility for failure to perform contractual obligations or delay in their performance differs due to the following legislation, while disasters fall within the concept of an emergency circumstance when the conditions of an emergency are met, and the implementation of the obligation becomes burdensome for the debtor. Methods of dealing with that fatigue differ according to the legal system followed, and the different addressing methods of disasters may have a positive impact, as it is possible to take advantage of the features of some laws to fill the shortfall in other ones.

Introduction

The impact of disasters on contractual obligations varies, as there are disasters that make the performance of the contractual obligations impossible, either permanently or temporarily. In both cases, non-performance or the delay in performance leads to damage to the creditor, and some disasters do not reach the stage of impossibility of performance. In this case, the debtor could fulfill his contractual obligation on time, but doing so would hurt the debtor.

While the interests of the creditor or the debtor are weighted, the means of treatment to reduce the damage caused by these disasters differ due to varied legal systems. Research on the impact of disasters on contractual obligations had to be studied within three aspects: the first aspect included the legal service of disasters that fall within the concept of force majeure, while the second aspect included the legal service of disasters that fall within the concept of emergency circumstance, and The third aspect is devoted to researching climate change and the extent to which it is considered a force majeure or an emergency circumstance, mentioning some of the applications of climate change.

Research Importance

The subject of our study, which is related to the impact of disasters on the performance of contractual obligations, is of great importance, as this importance appears in how to balance the interest of the creditor and the debtor and determine which of them bears the contractual responsibility arising from these disasters, and the difference in the type of disaster and its classification under the concept of force majeure or emergency circumstances. It is important in determining the type of treatment that reduces the loss that one of the parties to the contract may be exposed to.

The Research Problem

The research problem lies in the lack of a unified treatment of breach of contracts as a result of the occurrence of disasters, especially since some of these disasters generally occur in all countries at the same time, as is the case in the Covid 19 delinquency, as some legal systems do not exempt or reduce contractual obligations except with the existence of an explicit clause in the contract that allows exemption or mitigation when a disaster occurs, while we find other legal systems that make the mere occurrence of a disaster a reason for exemption or mitigation of contractual obligations without the need for a contractual agreement between the parties.

Research Methodology

The research on the impact of disasters on the performance of contractual obligations required the use of the comparative analytical approach of English, French, Egyptian and Iraqi laws.

The First Aspect: The Legal Service for the Disasters That Fall Within the Concept Of Force Majeure

French law defines force majeure as an event that is not subject to the control of the debtor and cannot be expected when organizing a contract. Its effects cannot be avoided by appropriate means. It prevents the debtor from fulfilling his commitment¹. The French judicial status does not differ from that of the legislative status. French courts have given the word obstacle (l'empêchement) to the force majeure.

In one of its decisions, the French court said, "If the obstacle has made the execution of the contract permanently impossible, it will expire, but if the obstacle is temporary, the execution of the contract will be suspended until the obstacle is removed."². The French concept of force majeure is similar to all comparative legislation. Iraqi and Egyptian laws are similar to French legislation. Force majeure within the meaning of these two laws consists of incidents that are not easy to anticipate when the contract is concluded by the parties, and that do not involve the will of the debtor to occur. They are external incidents that the debtor does not cause³.

English law is almost similar to its peers of comparative legislation in regards of the concept of force majeure, As the English judiciary interpreted the force majeure clause, that force majeure includes unexpected facts that are not due to the act or negligence of the debtor⁴, but the difference lies in the effect of force majeure on contractual obligations. French, Iraqi, and Egyptian legislations exempt the debtor from the liability of failure to perform or delay in performance whenever force majeure is a reason why the debtor does not fulfill his obligations within the agreed time.

However, English law makes the debtor liable for a breach even if it is beyond its control. The debtor is not exempt from liability unless the contract includes a force majeure clause, The parties can include in their contracts an express condition that deals with The occurrence of circumstances or disasters of an unexpected occurrence at the time of the conclusion of the contract, and in the absence of such a condition, the debtor is obligated to perform his contractual obligations on time, and The delay that occurs in the performance of the obligation due to the presence of this event is not considered a forced delay as the English courts decided for a long time that emergencies arising later and that were not expected at the time of the conclusion of the contract do not relieve the contracting party of his obligations, when the contract is free from the condition of force majeure, as the party that was unable to perform the obligations on time is obligated to pay compensation, while the other party is not obligated to accept late payment for the time specified in the contract⁵,

The Second Aspect: The Legal Treatment of Disasters That Fall Within the Concept of Emergency Circumstance

The theory of emergency circumstances represents one of the exceptional cases that allows the judge in some legislations to deviate from the principle of binding force of the contract, where it gives the judge the right to intervene in modifying the terms of the contract in the event of exceptional unexpected events that lead to an imbalance in the Economic equilibrium of the contract, which exposes one of the parties to an accidental injustice after the conclusion of the contract, as the implementation of the contract becomes burdensome to that party¹⁰.

This unfairness that affects the debtor in the performance of the obligation is what made the legislator depart from the original¹¹, and for the purpose of applying this theory, several conditions must be met. The contract must be lax, that is, there should be a period of time between the conclusion of the contract and its performance. But it is not required that the contract be a successive contract. The contract can be an instant contract, and the two parties agreed to postpone its performance.

It is also required that the incident be general and not concern the debtor himself, i.e., it is not about his own. It should be exceptional, i.e., contrary to the usual and familiar matters, unexpected and not be driven away by the debtor. In addition, this incident is required to make the execution of the obligation burdensome for the debtor, meaning that implementation of the obligation is still possible, but it predicts that the debtor will suffer an enormous economic loss upon the performance of the contract¹².

However, the judge's intervention in amending contractual obligations due to the emergency circumstance was not agreed upon by all comparative legislation. While Iraqi and Egyptian legislators allowed the judge to intervene to amend those obligations¹³, the French legislators did not allow the judge to intervene immediately when an

exceptional circumstance occurs. This intervention is only possible if the debtor has not agreed to take care of the emergency circumstance.

It also stipulated that there should be a negotiation between the parties in the event of a circumstance at the request of the party affected by the emergency circumstance. In the event of failure or rejection of the negotiation, the parties can agree to terminate the contract or request the judge to adapt the contract. In the event of disagreement, the judge can intervene at the request of one of the parties, where the judge either modifies or terminates the contract according to the conditions specified by him. The role of the judge to intervene is limited by several restrictions that must be observed before amending the terms of the contract¹⁴.

It is necessary to distinguish between the emergency circumstance and force majeure, as force majeure differs from the emergency circumstance in that force majeure makes the performance of the obligation impossible for the debtor, while the debtor's performance of his obligations is possible in the emergency circumstance, but it is a

Nathalie, EPIDÉMIE, Cause De Force Majeure Ou Imprévision Dans Les Contrats? On The Website

<https://www.village-justice.com/articles/epidemie-cause-force-majeure-imprevision-dans-les-contrats,33829.html>,

Date of visit (Apr 16, 2021).

10 See Tanago Samir. A., (1st ed 2009), Sources of Obligation, Al-Wafa Legal Library, Alexandria - Egypt, p477, as the matter of amending contractual obligations is left to the discretionary power of the judge. The discretionary authority means the legal and subjective authority of the judge to find the appropriate solution to each dispute raised in front of him separately, according to the standards of law, appropriateness and justice, see Abdul Karim Faris. H., (2001), The idea of the standard in law and its applications in civil law (a comparative study), Master thesis, College of Law - University of Baghdad, p175; Al-Khalidi Hamid Sultan, Louay Sattam Hammoud, (2019), The discretionary power of the judge in granting a judicial deadline in the execution lawsuit (comparative study, research published in the Journal of Legal Sciences, College of Law - University of Baghdad, sixth special issue, p70-71. 11 Al-Aboudi Nawras. A., (2018), The Defective Implementation of Nodal Obligation (a comparative study), PhD thesis, College of Law - University of Baghdad, 158.

12 See Al-Tabbakh Sherif. A., (1st ed 2006), Compensation for Tort and Civil Liability in the Light of Judiciary and Jurisprudence, Dar Al-Fikr Al-Jamii, Alexandria - Egypt, p517 - 518.

13 See the Iraqi Civil Code Art (146-2); the Egyptian Civil Code Art (147-2).

14 For more details see Qassem Muhammad. H., (2018), Civil Law - Obligations - Sources - Contract, Volume 2, I 1, Al-Halabi Human Rights Publications, Lebanon, p74 – 75, as see the text of Art 1195 of the French Civil Code. cumbersome performance for him, and force majeure is similar to the emergency circumstance In that both of them may be a temporary impediment to performance, so they have the effect of suspending the performance of contractual obligations, and this is what prompted the French legislator to make the temporary impediment a reason to stop the performance of those obligations¹⁵, and according to that similarity, the judge can intervene to modify the time of performance of the obligation, by stopping the performance of those obligations. Obligations during the time when disasters that are classified under emergency circumstances or force majeure occur, and after the disaster ends, the performance of obligations is resumed again.

Here, we may ask to what extent the Corona pandemic is a reason to apply the theory of emergency circumstances and therefore amend contractual obligations accordingly.

One of the most important conditions for applying the theory of emergency circumstances is that the emergency circumstance is unexpected for the debtor. Therefore, contracts that were concluded before the onset of the pandemic and continued after its occurrence are subject to this theory for the validation of unpredictability conditions.

Contracts concluded after the World Health Organization declared the pandemic a global epidemic are not subject to this theory, because the pandemic has become one of the things expected and familiar to both parties to the contract. The debtor cannot invoke it to amend contractual obligations¹⁶.

As for English law, the theory of Emergency circumstances, or as it is called in Anglo-Saxon laws (Impracticability), means that a contract has become impractical due to unexpected circumstances at the time of its conclusion. This makes the actual cost of performance exceed the expected cost. The theory of emergency circumstances is part of the doctrine of impossibility, which was not followed by English law without the existence of a contractual agreement specifying how to deal with impossibility, until the principle of frustration of the contract was established¹⁷. That is, the judge's intervention requires that the conditions that are approved by the English legislator are met in order to achieve frustration of the contract.

In one case law, the facts of which are summarized in the conclusion of a contract or work between Davis Contractors Ltd and the District Council of Fareham for the purpose of building 28 houses within a period of 8 months, provided that materials and skilled labor will be supplied when necessary to complete the work within the agreed period. Due

to the lack of skilled labor, for reasons desired by none of the parties, it took (22) months to complete the work instead of 8 months, which led to the request of the contracting company to increase the amount, claiming that the shortage of skilled workers led to delays in completion, causing frustration of the contract.

But the court held that the mere delay or increase in expenses is not sufficient to invoke frustration, as there must be a radical difference between what is stipulated in the contract and what is expected to be performed according to the new circumstances¹⁸. Lord Radcliffe went on to say in this context, "The hardship, inconvenience, or material loss is not a limit itself that calls for the principle of frustration, as there must be a change in the importance of the obligation, so that the obligation, if it is implemented, is different from that contracted upon."¹⁹

The Third Aspect: Climate Change and the Theories of Force Majeure and Emergency Circumstances

Climate changes are one of the biggest threats to health, as they leave many catastrophic effects on health for many individuals, but their impact is not limited to the health aspect, as it extends to the contractual aspect and affects the contractual obligations of the contract parties, as these changes may prevent the debtor from performing His contractual obligation is at the agreed-upon time, so does the debtor bear the responsibility for the delay in

Research in this matter requires considering the extent to which the conditions of force majeure or the emergency circumstance are available in these changes, as the decisive factor for considering any environmental or climatic phenomenon is a force majeure or an emergency circumstance is the availability of the conditions required by the laws of the comparative countries, and this is what actually happened in one of the judicial precedents The Egyptian Court of Cassation, which ruled that the unexpected storm is a force majeure whenever the conditions specified by Article 147 of the Egyptian Civil Code are met²⁰, In another decision, the court considered the sea risks resulting from the severe and unpredictable weather a reason to exempt the debtor from liability for breaching his contractual obligation, From the point of view of the court, these risks are considered as force majeure when they reach a degree of severity that makes them unpredictable and impossible to ward off²¹.

Dust storms are among the climatic phenomena that have increased in incidence in recent years, as they are caused by extreme climatic changes represented by lack of rain, loss of vegetation cover and strong winds, These storms occur in dry and semi-arid areas during the summer and spring, and the intensity of these storms varies, from light storms to storms of a large degree of intensity, leading to blocking vision and disrupting public facilities²², and this is what actually happened in Iraq, as the extent of visibility in one of the storms reached to 400 meters, which led to the suspension of air traffic at Baghdad and Erbil airports²³, The reason for that suspension was the delay in the airports' fulfillment of their contractual obligations of delivering passengers during certain dates, as flights were delayed as a result of those storms, So does the airports administration bear the contractual responsibility for that delay, or do those storms fall within the concept of force majeure or emergency circumstances, so that the debtor is absolved of responsibility?

One of the most important conditions for applying the two theories of force majeure or emergency circumstance is the condition of expected, so expecting those storms in terms of the time of occurrence and severity at the time of the conclusion of the contract is what gives or negates the character of force majeure or emergency circumstance, and then bears the debtor responsibility or not, contracts that are concluded and implemented Within a short period, the condition of expectation is available, as its availability can be proven through weather reports that determine the expected time and intensity of the storm, while the expectation is absent in contracts where there is a long time between its conclusion and its performance, and the length of that period is measured according to weather reports. Which includes the expectations of the occurrence of those storms, and the parties to the contract can address the impact of contractual obligations on weather changes by adding a clause in the contract specifying the rights and duties of the parties to the contract when exceptional weather conditions occur, as is the case in the JCT contract model, as this contract specifies the cases in which he can In which the debtor demands an extension of the time for the performance of his contractual obligations, and among those cases, there are exceptionally bad exceptional circumstances²⁴.

Conclusion

The classification of a disaster as a force majeure or an emergency condition is important. The legal provision to which the debtor is subject varies according to the concept under which the disaster falls, and the different legal

systems followed. Each legal system has advantages and disadvantages. One of the disadvantages of some comparative legal legislation in this regard is that it favors the interests of the debtor at the expense of the creditor. Although disasters affect all parties to the contract, this legislation exempts the debtor from liability when classifying a disaster as force majeure or gives the judge the power to intervene for the purpose of reducing the obligations of the debtor when the disaster is classified as an emergency condition, which leads to the creditor bearing the damage of the disaster alone. This is contrary to the principle of contractual justice.

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